

**LAURA MEASE and MARTY MEASE,**  
**Members of the SaddleBrooke**  
**Homeowners' Association,**  
  
**Plaintiffs,**  
  
**v.**  
  
**CITY OF SHAWNEE, JOHNSON**  
**COUNTY, KANSAS,**  
  
**Defendant.**

**No. 03-2041-CM**

On May 22, 2003, the court issued an order (Doc. 31) (“the Order”) enjoining defendant City of Shawnee (“the City”) from enforcing Ordinance 2625 and Ordinance 2655 (“the Ordinances”), which pertain to deed restrictions governing the SaddleBrooke subdivision. This matter is before the court on the City’s Motion to Alter or Amend the Preliminary Injunction (Doc. 36).

The court enjoined the City from enforcing Ordinances 2625 and 2655 in their entirety. The City argues that the Ordinances contain three separate substantive provisions or parts that are severable and distinct and that only one of those parts, subsection (b), is relevant to the SaddleBrooke covenant which is the subject of this action. The City asks that the court modify the Order to preliminarily enjoin the City from enforcing only subsection (b) of Ordinance No. 2655.

## I. The Ordinances

The City passed Ordinance No. 2625 on August 26, 2002, which amended the City's Residential Building Code by adding Section R 901.2, Restrictive Covenant Limitation. Approximately six months later, the City amended section R 901.2 in part by passing Ordinance No. 2655.

The substantive provisions are set out in Section 1 of each of the Ordinances. Section 1 of each Ordinance consists of three separate subsections—(a), (b), and (c). The substantive provision of Ordinance 2655 in its entirety reads:

SECTION 1. The Shawnee Municipal Code Section 15.04.020, Subsection B, item number 15 is hereby amended to read as follows:

15. Amend the 2000 International Residential Code for One and Two Family Dwellings by adding the following:

**R 901.2 RESTRICTIVE COVENANT LIMITATION.** A “restrictive covenant” means a covenant, whether contained in a deed, homes association declaration, declaration of restrictions or otherwise, that has been recorded with the Register of Deeds of Johnson County, Kansas, and runs with the land.

(a) It shall be unlawful to establish or attempt to enforce a restrictive covenant which requires the exclusive use of wood shingles or wood shake roof covering material on a residential dwelling within the City and any such restrictive covenant is contrary to the public policy of the City and is null and void.

(b) It shall be unlawful to establish or enforce a restrictive covenant which requires, permits or allows the use of wood shingles or wood shake shingles or any unrated roofing material on a residential dwelling within the City and such restrictive covenant is contrary to the public policy of the City and is null and void unless the restrictive covenant also allows the use of one or more classes of rated asphalt shingles, either Class A, Class B, or Class C.

(c) Nothing in this Code shall prohibit a restrictive covenant regulating the kind of roofing materials used or regulating

colors, styles or dimensions of roofing materials, or other aesthetic factors so long as the regulations are not contrary to the provisions of (a) or (b).

Ordinance 2655 amended the same Building Code provision as did Ordinance 2625 with the only change, other than adding a definition of “restrictive covenant,” being in subsection (b). Subsections (a) and (c) were unchanged. Ordinance 2655 also provided that “Upon the taking effect of this Ordinance the previously existing Shawnee Municipal Code Section 15.04.020, Subsection B, Item number 15 is repealed.”

## **II. The Order**

The Order at issue granted plaintiffs’ motion for a preliminary injunction. In the Order, the court analyzed the constitutionality of subsection (b) of the Ordinances. Plaintiffs did not challenge, nor did the court consider or cite to, subsection (a) or (c). With respect to subsection (b), the court found that the Ordinances exceeded the legislative purpose behind their enactment and therefore violated plaintiffs’ constitutional rights under the Contract Clause. In the end, the court issued the following order: “The City is hereby preliminarily enjoined from enforcing Ordinance 2625 and Ordinance 2655.”

## **III. Discussion**

The court did not specify with particularity the subsection which was subject to the preliminary injunction. However, considering that subsection (b) was the only statutory provision analyzed by the court, and considering that plaintiffs never alleged that subsections (a) or (c) were unconstitutional, the court concludes that it should have limited the Order to enjoining the City from enforcing subsection (b).

Plaintiffs argue that the City should also be enjoined from enforcing subsection (a) because “the Ordinances do not prospectively affect the right to contract but rather *retroactively* impair contractual rights

that vested prior to the passage of the Ordinances.” This issue, however, was simply not before the court—the court made no conclusions of law with respect to subsection (a). Plaintiffs also contend that the City should be enjoined from enforcing subsection (c) because, plaintiffs contend, subsection (c) cannot stand on its own without subsection (b). The court disagrees, since both Ordinances include a severability clause, which states:

SECTION 3. Severability. If any part or parts of this Ordinance shall be held to be invalid, such invalidity shall not affect the validity of the remaining parts of this Chapter. The Governing Body hereby declares that it would have passed the remaining parts of this Chapter if it had known that such parts or parts thereof would be declared invalid.

Finally, the City points out that the court need only be concerned with Ordinance 2655. The substantive provisions of Ordinance 2625 were repealed upon the publication of Ordinance 2655. The court agrees that, to the extent that Ordinance 2625 has been repealed and has no force or effect, an order enjoining the enforcement of Ordinance 2625 is unnecessary.

**IT IS THEREFORE ORDERED** that the City’s Motion to Alter or Amend the Preliminary Injunction (Doc. 36) is granted. The court hereby amends the Order (Doc. 31) to read as follows: **The City is preliminarily enjoined from enforcing Ordinance 2655, subsection (b), until further order of this court.**

Dated this 18 day of July 2003, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**

